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Sir John Rolle K^t. of the Bath, Plaintiff.

Degory Gree, Defendant.

The CASE of the Plaintiff in Error.

THE Plaintiff Sir John Rolle and John Newel Gent. with some others, having for a full and valuable Consideration, honestly and *bona fide* Paid more than twenty Years since, Purchased of Anthony Trelvelian Esq; (a Person not named in the Settlement, under which the Defendant pretends to make Title) and his Trustee, the Mannor or Lordship of Yarnescombe in the County of Devon, with the Barton Farm and Demeasne Lands thereof, and several other Mannors, Lands and Tenements in the said County, and in the County of Cornwall, (part of the Antient Estate of his Family) were in quiet Possession under their Purchases, until Declarations in Ejectment were delivered, as of Hillary Term in the eighth Year of the Reign of His late Majesty, in the Name of Degory Gree (now Defendant in Error) upon the demise of Lewis Bampffield Esq; under pretence of a Term for Years, created by an old Settlement in the Year 1649, for the raising of Portions, of which Sir John Rolle had never any manner of Notice. Sir John Rolle and John Newel appeared to the Declarations, and joyned in pleading not Guilty, and the Plaintiff Gree, carried the Record down to be tryed by *Nisi prius* at the Summer Assizes, in the 12th Year of the late King. The Plaintiff Gree had the making up of the Record, and the Case stands thus upon the Record as himself has made it up; an *Ejectione Firma* in the King's Bench, by Original, against Sir John Rolle and John Newel of the Mannor of Yarnescombe, and other Lands in the County of Devon: The Defendants plead not Guilty, there are Continuances by *Vic non Misit Breve*, until Trinity Term Anno 12. W. 3. between Gree Plaintiff and both the Defendants (Rolle and Newel) then *Jurata Int' partes predict' ponitur in respectu tres Mich. Nisi* Sir John Powel *prius Scilicet xvi. Aug. venisset*, &c. Mr. Justice Powel being the Judge of *Nisi prius* permitted the Plaintiff to proceed at his Peril, as is usual for Justices of *Nisi prius* to do; without concerning themselves, to examine into the regularity of bringing the Issue to be Tryed before them, for the Trying of the Issue is their only Business, and the Regularity of bringing it on to Tryal, is the proper Business of the Court above to determine; At *Tres Mich.* the appearance is entred thus, *& modo ad hunc diem venerunt tam predict' Degoreus Gree quam predict' Johannes Rolle Rolle and Johannes Newell, per Attorn' suos predict'*. And the *Postea* is return'd, which the Plaintiff Gree has drawn up in this Manner, That at the Assizes, Gree came in Person, and Rolle and Newel *Sollemiter exacti non venerunt*, thereupon Gree *gratis in cur' Cognovit se ulterius nolle prosequi versus Newell de premissis prad in exit. per patriam Triand' Junct' & petit quod jurata illa Capiatur per defaulta versus predict', Johannem Rolle Jo' Jurat' illa Capiatur versus dictum Johannem Rolle Tantum per defaultam*. Then several of the principal Pannel, (who were return'd to try an Issue joyned between Gree Plaintiff, and Rolle, and Newel, Defendants, and no other Issue) are Sworn, and there is a Tales added to them, *Ad veritatem de infra contentis Simul cum aliis Juratorib. predict' prius ad hoc impannellat & Jurat. int' predict' Degorum & Johannem Rolle (omitting Newell) dicend. Elicet. Triat. & Jurat.* And the Plaintiff Gree has entred some Special Matters upon the Record, as he thought fit to draw it up, for the Defendant.

Sir John Rolle insisting, that this whole Proceeding is Erroneous and Void, would not join or Concern himself in it. The Matter depending for sometime in the Kings Bench, and Mr. Justice Powis, and Mr. Justice Gould, against the Lord Chief Justice Holt (Mr. Justice Turton being absent) gave Judgment for the Plaintiff.

It is humbly Conceived, that this Judgment is Erroneous.

First, Because there is no Law whatsoever which enables Justices of *Nisi Prius* to receive a *Retraxit* against one Defendant, much less thereby to sever any Issue which came down Joint, and then to Try the Issue against the other omitting him.

Secondly, Altho' the Plea of the Defendants was such, that each of them might have pleaded it separately, yet having joined in it, it is one single Issue, for the Tryal of which there must be but one *venire facias*, and was so in this Case. And the *Nolle Prof.* at the Assize against Newell did not discharge him, so that Newell remained a Party to the Issue; yet not that Issue, but one against Sir John Rolle singly is Tryed, and this Alteration made by the Act of the Plaintiff himself, so that the Jury were sworn to Try a new Issue, not that which was sent down to the Judge of *Nisi Prius*, or which the Jury were Impannelled and Returned to Try; and is therefore conceived to be wholly without Warrant.

Thirdly, If it were taken to be a present Discharge of Newell, It is Conceived the Judgment is for that reason Erroneous; for the Issue being Joint, that Discharge of Newell would amount to a Discharge of Sir John Rolle too, there being no Case, whereupon a Joint Issue the Plaintiff may relinquish his Suit against One, and proceed against the Other: Not even in a *Trespas*; And much less in an *Ejectment*, in which it is incumbent on the Plaintiff to make it appear, that he has a Title against all Persons whatsoever. And Gree having affirmed by his own Declaration, that Newell is in possession of the Lands, not making, nay, in effect Confessing, that he can make no Title against him, he has not Intituled himself to recover the Possession of the Land, which is the Judgment that is to be given in an *Ejectment*.

Fourthly, This is a Proceeding not supported by any one Authority or Precedent in the Law that has been hitherto Cited, and no one can tell where (if this be allowed) it may stop. If Entries made by the Parties shall extend the Power of Justices who have no Authority but what is Granted and especially Described by particular Statutes, to Matters not within the Words or Intent of those Statutes, and such their Proceeding shall by the Supream Court, be Affirmed and Allowed as Legal, it will be of the last Consequence. The Hardship of a particular Case may move Compassion, but that Hardship will not bear the being put into the Ballance with the Mischief of such a Precedent; which will Countenance, if not Justifie, other limited Jurisdictions in Acting discretionarily, wherever they think it convenient to vary from common and known Rules.

Wherefore 'tis humbly Hoped that this Judgment shall be Reversed.

St. John Brodrick.